IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit.

BRIEF FOR AMICI CURIAE UNITED STATES STEEL CORPORATION AND WHEELING-PITTSBURGH STEEL CORPORATION IN OPPOSITION TO THE GRANT OF THE PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether Defendant can be prosecuted for its failure to hold a permit under Section 13 of the Refuse Act of 1899 (33 U.S.C. § 407), for a discharge of treated waste water with no tendency adversely to affect navigation alleged to meet applicable water quality criteria which took place in the summer of 1970 prior to the creation of a program for the issuance of permits governing such discharges.

2. Whether the Defendant's claim that it was affirmatively misled by the Corps of Engineers into believing that no permit from the Corps of Engineers was necessary to discharge into the Monongahela River treated waste water with no tendency adversely to affect navigation is an adequate defense to the present prosecution.

INTEREST OF THE AMICI CURIAE

Criminal informations were filed against United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation in the United States District Court for the Western District of Pennsylvania on the same day as the criminal information involved in this matter was filed against Pennsylvania Industrial Chemical Corporation ("PICCO"). The informations involve discharges of substances with no tendency adversely to affect navigation in the summer of 1970 prior to the existence of a permit program for such discharges. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation moved to dismiss the informations filed against them. Following argument on the motions to dismiss, the District Court entered an order deferring decision of the motions to dismiss until the decision of the Third Circuit Court of Appeals in this matter. No decision has yet been entered on the motions to dismiss. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation believe the disposition of the informations filed against them is likely to be controlled by any action of this Court in the present matter. Therefore, they have obtained the consent of the Solicitor General and counsel for PICCO to file this brief as amici curiae.

ARGUMENT

There are no issues involved in this case which have sufficient importance to justify consuming the time of this Court in their resolution. The essential holding of the Court of Appeals for the Third Circuit is that it was a violation of due process to prosecute PICCO criminally for the failure to have a permit under Section 13 of the Refuse Act of 1899 (33 U.S.C. § 407) (hereinafter "§ 13") for the discharge of treated industrial waste water with no tendency adversely to affect navigation into the navigable waters of the United States if at the time the discharges took place, there was no program pursuant to which PICCO could have obtained such a permit. Two events which have happened since the date of the discharges involved in this case have severely limited the significance of the decision of the Court of Appeals. First, on December 25, 1970, by Executive Order No. 11574, 35 Fed. Reg. 19627, the President announced the promulgation of a permit program under § 13 for discharges of the type involved in this case. Hence, with regard to discharges taking place after the implementation of the permit program on April 7, 1971, 36 Fed. Reg. 6564, 33 C.F.R. § 209.131, no one can argue that no mechanism existed for obtaining a permit pursuant to § 13. For practical purposes the *PICCO* defense cannot be raised in connection with any discharges taking place after that date. It is true, as the Government notes, that in the case of *Kalur v. Resor*, 335 F. Supp. 1 (D. D. C 1971), *appeal pending*, the issuance of permits under the new regulations was enjoined by the District Court for the District of Columbia on the ground that the regula-

tions of the Corps of Engineers fail to satisfy all requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). However, this decision when read with *PICCO* obviously does not prevent the Government from prosecuting persons who have not applied for permits, nor persons whose applications for permits have been rejected for inadequacy or because the proposed discharges are unsatisfactory. It is difficult to imagine why the Government would wish to prosecute someone who had submitted a satisfactory permit application where the only inhibition to the issuance of a permit is the injunction issued in *Kalur v. Resor, supra*. The *PICCO* decision seems to have no bearing whatsoever on accidental spills into the navigable waters of the United States. Hence, despite the protestations of the Government, the *PICCO* decision appears to have practically no effect on enforcement of § 13.

There is, however, an additional development which renders the *PICCO* decision even less significant. On October 18, 1972, the Federal Water Pollution Control Act Amendments of 1972 (S 2770) ("the Amendments") became law. The Amendments have a significant effect on § 13. The permit program is continued, but responsibility for permits involving discharges with no tendency to affect navigation is transferred from the Corps of Engineers to the Environmental Protection Agency. Most important, the Amendments provide in Section 402(k) that:

> "Until December 31, 1974, in any case where a permit has been applied for pursuant to this Section [which by Section 402(a)(5) of the Amendments is deemed to include applications pending under §

> 13], but final administrative disposition of such application has not been made, such discharge shall not be a violation of . . . Section 13 of the Act of March 8, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application."

This provision has the effect of codifying and confirming the limitations on the effect of the *PICCO* decision which we have suggested above. As a result, we submit that *PICCO* can control only a handful of cases all involving events which took place over 18 months ago. Although the Government states at page 10 of its petition that 115 criminal cases brought since 1970 are pending, it does not state how many of those involve accidental spills to which the defense of unavailability of a permit is not very plausible or how many involve discharges after the institution of a permit program to which the *PICCO* decision would not appear to be literally applicable. With regard to civil suits, we suggest that the limitations of the savings provision of the Amendments are controlling and obviate any questions raised by *PICCO*. The savings provision in Section 4(a) of the Amendments refers only to suits under the Federal Water Pollution Control Act and does not refer to civil suits under § 13.

The Court may rightly ask if our argument as to the limited effect of the *PICCO* decision is true, why the

amici have troubled themselves with the preparation and filing of this brief. The answer is that while the issues of *PICCO* are of little significance to others in the future, they are of great significance to the amici with regard to multiple count criminal informations filed against them at the same time as those filed against PICCO and arising out of like discharges in the summer of 1970. The amici feel severly aggrieved by the act of the United States in prosecuting them for failure to possess a permit that no reasonable man would have believed was necessary and no reasonable man then or now would have believed to have been available at the time charged in the informations. The information against United States Steel Corporation is in 35 counts while that against Wheeling-Pittsburgh Steel Corporation is in 13 counts. In light of the action of the District Court for the Western District of Pennsylvania in the *PICCO* case in assessing the maximum fine of $2,500 on each count, there is ample financial incentive for the amici to pursue this matter even if principle were not involved.

The amici contend that the resolution of this matter by the Third Circuit was a sound one. Although that court rejected the contention that § 13 was limited to a prohibition of discharges with a tendency to affect navigation, it recognized that a reasonable person, relying on the official pronouncements of the Corps of Engineers dealing with § 13, could well have reached that conclusion at the time the discharges of PICCO took place. Second, the Court of Appeals recognized the incontrovertible fact, acknowledged by representatives of

the United States in their more candid moments,* that there is a fundamental inconsistency between the absolute prohibition of waste water discharges with no tendency to affect navigation now said by the Government to be contained in § 13 and the provisions of the Water Quality Act of 1965. The latter Act obviously recognizes that a certain amount of discharge is inevitable under the current state of technology and the economy and hence provides for the definition of standards of water quality and for the abatement of dis-

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* E.g., in an interview with William Ruckelshaus, Administrator of the Environmental Protection Agency, published in the May, 1971 issue of *Environmental Science and Technology* under the caption, "A Candid Conversation with the First Administrator of the Environmental Protection Agency," the following exchange took place at page 392:

[QUESTION]:

"Isn't there overlapping federal jurisdiction on enforcement already under the Refuse Act and the Federal Water Pollution Control Act?"

[ANSWER BY MR. RUCKELSHAUS]:

"The laws almost contradict one another. Under the 1899 Refuse Act, it is against the law to dump refuse into the navigable waters or their tributaries without a permit. The Federal Water Pollution Control Act specifies the setting of standards by the states and approval by the federal government. Under the 1965 Act, the people are to comply with the water quality standards; it says nothing about discharge into a stream being illegal.

"It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream."

charges which violate such standards. The clear implication of the Water Quality Act of 1965 is that discharges which meet or better the existing water quality standards are lawful.

The Court of Appeals recognized that the only way the alleged absolute prohibition of § 13 could be reconciled with the clearly implied permissibility of discharges which meet the water quality standards under the modern legislation was through the device of a permit program under § 13 which would authorize discharges which met applicable standards. Despite the argument of the Government at pages 14 and 15 of its brief that Congress in 1899 intended to absolutely prohibit discharges into the navigable waters of the United States, it seems impossible in light of the economy and technology at that time to believe that Congress intended anything more than to regulate the location of such discharges. The Court of Appeals rightly did not allow itself to be persuaded that in 1899 Congress prohibited all discharges into the navigable waters of the United States. In addition, the Court of Appeals examined the record which showed PICCO's offer to demonstrate clearly that the Corps of Engineers had never contemplated the possibility that it had authority to institute such a program at the time PICCO made its discharges. It examined the record which showed PICCO's offer to prove that PICCO had obtained those permits for its discharges of treated waste water which were clearly required under the Clean Streams Law of the Commonwealth of Pennsylvania and those permits from the Corps of Engineers for construction of its outfalls that were clearly required by the regulations of the

Corps. The Court of Appeals reached the eminently reasonable conclusion that assuming the existence of the facts in the offers of proof the conviction of PICCO was an "unsound result" and a denial of due process. As the Court said, "Congress did not intend criminal penalties for one who failed to comply with a non-existent regulatory program."

CONCLUSION

Both because of the relative unimportance of the *PICCO* decision and the soundness of the result reached by the Court of Appeals for the Third Circuit, this Court should decline to exercise jurisdiction and deny the petition for a writ of certiorari.

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OCTOBER TERM, 1972

No. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVANIA INDUSTRIAL CHEMICAL CORPORATION

ETITION FOR A WRIT OF CERTIORARI TO THE UNITED ATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EPLY MEMORANDUM FOR THE UNITED STATES

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pposition to the petition for a writ of certiorari, ndent urges that the decision of the court of ap- should be sustained since at the time the com- discharged pollutants into the Monongahela no formal permit program existed under the Act. Reference is made to an interview with m D. Ruckelshaus, Administrator of the En- ntal Protection Agency ("EPA"), reported May 1971 issue of the trade magazine, "En- ntal Science & Technology." Mr. Ruckelshaus quoted as stating that persons could not "get] if they wanted to" prior to implementation

-72

of the December 1970 permit program; before then "we did not have any permit program for the discharge of waste into a stream." *Id.* at 392.

As is not infrequently the case in interviews of this sort, the statement attributed to Mr. Ruckleshaus is not entirely accurate. It is true that no formal permit "program" such as the one established by Executive Order No. 11574 in December 1970 (see Pet. 6 n. 5) existed at the time of the discharges involved here. But a federal discharge permit could then have been obtained under the Refuse Act, in the discretion of the Secretary of the Army, had respondent made an application. Perhaps because issuance of such permits was not the responsibility of the EPA Administrator, but was a discretionary function assigned by statute (33 U.S.C. 407) to the Secretary of the Army, Mr. Ruckelshaus was not entirely familiar with past practice.[1] In any event, permits, though few in number, were issued by the Secretary of the Army under 33 U.S.C. 407 between 1963 and 1969.[2]

The fact that the number of permits issued under the Refuse Act was far fewer than are presently contemplated under the new "program," and that they were not issued under formalized procedures, is, as

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[1] As pointed out in our petition (p. 17, n. 18), the Secretary of the Army's permit authority under the Refuse Act was transferred to the EPA Administrator by the Federal Water Pollution Control Act Amendments of 1972 (Sections 101(d) and 402).

[2] "Effects of Mercury on Man and the Environment," Hearings Before the Subcommittee on Energy, Natural Resources and the Environment of the Senate Committee on Commerce, 91st Cong., 2d Sess., Pt. 2, pp. 168 and 201 (July 29-30, 1970).

stated in our petition, insufficient basis for reading out of the Refuse Act the ban on discharging pollutants into the Nation's navigable waters. The First Circuit recently so held in *United States* v. *Granite State Packing Co.*, No. 72–1253 (November 6, 1972), in an opinion which we are appending hereto. The *Granite State* decision is contrary to the decision in the instant case and thus presents a conflict between the First and Third Circuits on an important question involving the construction of a federal criminal statute that should be resolved by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72–1253

UNITED STATES OF AMERICA, APPELLEE

v.

GRANITE STATE PACKING COMPANY,
DEFENDANT, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Before COFFIN, *Chief Judge;* ALDRICH and CAMPBELL, *Circuit Judges.*

November 6, 1972.

ALDRICH, *Senior Judge.* Defendant, operating a slaughtering plant in the City of Manchester, New Hampshire (City), appeals from a conviction on three counts for violating section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407, also known as the Refuse Act of 1899, in that it did "discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . refuse matter . . . other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water

of the United States. . . ." *United States* v. *Granite State Packing Co.*, D.N.H., 1972, 343 F.Supp. 57. In this court defendant does not dispute the district court's finding that the Merrimack River, hereinafter river, is navigable in the jurisdictional sense. *United States* v. *Appalachian Power Co.*, 1940, 311 U.S. 377, 404–10; *Rochester Gas & Elec. Corp.* v. *United States*, 2 Cir., 1965, 344 F.2d 594, or that its animal waste is not exempted sewerage; *United States* v. *Republic Steel Corp.*, 1960, 362 U.S. 482; *United States* v. *Pennsylvania Indus. Chem. Corp.*, W.D. Pa., 1971, 329 F.Supp. 1118, *rev'd on other grounds*, 3 Cir., 1972, 461 F.2d 468. It advances various defenses based upon the fact that it discharged its refuse into the sewerage system of the City.

The facts are these. Sometime prior to 1885 a railroad, laid out between defendant's plant and the river, constructed a stone culvert under its right of way to carry discharges by defendant's predecessor in occupation. In 1885 the City connected a sewer to the culvert, part way between defendant's plant and the railroad track. Since then defendant's and the City's effluents, mingled at the point of juncture, jointly pass under the track and into the river. No exercise of eminent domain, deeds, or other documents support any part of this procedure, but it would seem reasonably apparent that by this time both defendant and the City have an easement of flow as against the railroad. Whether defendant has enforceable rights against the City need not be considered. The court found, stretching the facts, perhaps, in defendant's favor, that since the culvert "is part of the municipal sanitary and storm sewer system" of the City, "defendant discharges into a public sewer." Although it might be said, instead, that the public sewer dis-

charges into defendant's culvert, we accept this finding for present purposes. The court concluded, however, that even though defendant discharged its refuse into a municipal sewer system, its contention that this freed it of liability did not follow. We agree.

There is nothing in the statute that supports defendant's position. As a matter of simple logic, if a party deposits an impermissible substance in a municipal sewer, knowing that the sewer leads directly into navigable water, it "causes, suffers, or procures" the substance to be discharged into the stream. *Cf. Nowlin* v. *United States,* 10 Cir., 1964, 328 F.2d 262. Moreover, it seems clear that the statute is not restricted to direct deposits, *United States* v. *Esso Standard Oil Co. of Puerto Rico,* 3 Cir., 1967, 375 F.2d 621, or, at least within limits, to *scienter. United States* v. *United States Steel Corp.,* N.D. Ind., 1970, 328 F.Supp. 354, 356.

Nor is defendant aided by the fact that a subsequent portion of the statute empowers the Secretary of the Army to grant exceptions from the broad prohibition. Under the authority of the Refuse Act and Executive Order No. 11574, the Secretary has established a comprehensive permit program. 33 C.F.R. § 209.131 (1971). Even if, which we need not consider, defendant could readily have obtained a permit, this would be no defense; the statute makes the receipt of a permit a condition precedent. While the regulation might be said to modify this requirement where a party "[d]ischarges or deposits into a municipal or other public sewage *treatment* system," 33 C.F.R. § 209.131(d)(2)(ii) (emphasis added), the City passes its sewage raw; there is no treatment. *United States* v. *City of Asbury Park,* D. N.J., 1972, 340 F. Supp. 555. Defendant's argument that the City is planning

to have a treatment system does not even warrant
description "specious."

Equally without merit is defendant's claim tha
on the other hand, it could not get a permit,
either contrary to the intent of Congress, or un
stitutional, to apply the statute to it. The statute
no purport to provide for permits as of right.
cally, it forbids certain conduct, with excepti
Defendant has not shown that the exceptions
arbitrary, unreasonable, or discriminatory. We
nothing more to the case.

Affirmed.

U.S. GOVERNMENT PRINTING OFFICE: 1971